

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

ALLEN TONY DAVIS and RODNEY FOSTER,

Plaintiffs,
v.
Case No. 08-C-0504

WARDEN RICHARD A. SCHNEITER,
PETER A. HUIBREGTSE, GARY BOUGHTON,
CAPTAIN LEBBEUS BROWN, SGT. BRIAN LANGE,
CAPTAIN MASON and JOHN DOE,

Defendants.

ORDER

On July 1, 2008, *pro se* plaintiffs Allen Tony Davis and Rodney Foster filed a complaint pursuant to 42 U.S.C. § 1983, alleging violations of their civil rights. The plaintiffs filed motions to proceed *in forma pauperis*, which the court resolved in an order dated August 13, 2008.

Davis' motion to proceed *in forma pauperis* was denied because Davis "has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g). Davis did not show he was "under imminent danger of serious physical injury" and, therefore, cannot proceed under the *in forma pauperis* statute. Davis failed to pay the full amount of the \$350.00 filing fee to the clerk of court within twenty days of the August 13, 2008 order. As a result, the court

will dismiss his case. Nevertheless, Davis incurred the \$350 filing fee by filing his complaint. *Newlin v. Helman*, 123 F.3d 429, 436-37 (7th Cir. 1997) (overruled on other grounds by, *Walker v. O'Brien*, 216 F.3d 626 (7th Cir. 2000) and *Lee v. Clinton*, 209 F.3d 1025 (7th Cir. 2000)).

Foster's motion to proceed *in forma pauperis* was granted. The court directed Foster to forward the sum of \$139.31 to the clerk of this court within 20 days of the order as an initial partial filing fee in this action. To date, Foster has not paid this partial filing fee. From this failure to pay the initial filing fee this court infers that the plaintiff no longer wants to prosecute this action. Therefore, the court will dismiss this case without prejudice for failure to prosecute.

The plaintiffs have filed a motion to appoint counsel. The dismissal of this action renders the plaintiffs' motion moot; the court will, therefore, deny the motion.

Accordingly,

IT IS ORDERED that this action be and hereby is **DISMISSED** without prejudice for failure to prosecute.

IT IS FURTHER ORDERED that the Secretary of the Wisconsin Department of Corrections or his designee shall collect from plaintiff Allen Tony Davis' prison trust account the \$350 balance of the filing fee by collecting monthly payments from the plaintiff's prison trust account in an amount equal to 20% of the preceding month's income credited to the prisoner's trust account and forwarding payments to the clerk of the court each time the amount in the account exceeds \$10 in

accordance with 28 U.S.C. § 1915(b)(2). The payments shall be clearly identified by the case name and number assigned to this action.

IT IS FURTHER ORDERED that the plaintiffs' motion to appoint counsel (Docket #6) be and the same is hereby **DENIED AS MOOT**.

IT IS ALSO ORDERED that copies of this order be sent to the warden of the institution(s) where the inmates are confined and to Corey F. Finkelmeyer, Assistant Attorney General, Wisconsin Department of Justice, P.O. Box 7857, Madison, Wisconsin, 53707-7857.

Dated at Milwaukee, Wisconsin, this 6th day of October, 2008.

BY THE COURT:



J.P. Stadtmueller
U.S. District Judge